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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1843

JOSEPH ACANFORA, III, *Petitioner,*

v.

BOARD OF EDUCATION OF MONTGOMERY COUNTY; MONTGOMERY COUNTY PUBLIC SCHOOLS; HOMER L. ELSEROAD, individually and as Superintendent of Schools; DONALD MIEDEMA, individually and as Deputy Superintendent of Schools; WILLIAM G. COLMAN, individually and as President of the Board of Education; JOHN AIRD, individually and as Vice President of the Board of Education; JAMES H. DAUGHERTY, ROSEMARY HILBERG, MARILLYN ALLEN, THOMAS B. COOK, and THOMAS ISRAEL, individually and as Members of the Board of Education of Montgomery County, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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v.

BOARD OF EDUCATION OF MONTGOMERY COUNTY, ET AL.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 491 F.2d 498, and is reproduced in the Appendix to this Petition at *App.* 1-10. The opinion of the District Court is reported at 359 F. Supp. 843, and is reproduced at *App.* 11-36.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on February 7, 1974. By order dated April 30, 1974, Chief Justice Burger extended the time for filing a petition for writ of certiorari herein to and including June 7, 1974. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner, a homosexual, applied for employment as a public school teacher. He did not disclose on his employment application that he had been a member of an organization devoted to advancing the legal rights of homosexuals. After he was hired, the school system discovered that he was a homosexual, and transferred him out of the classroom pursuant to its policy of not knowingly employing homosexuals as teachers. The Court of Appeals held that the non-disclosure on the employment application, although not the reason why petitioner was transferred, disqualified him from challenging the constitutionality of the transfer. The following questions are presented:

1. Whether a public employee who suffers employment discrimination for constitutionally impermissible reasons may be denied judicial relief because there exists another reason, which did not in fact motivate the interference with employment, which would have constituted a permissible reason for such interference.

2. Whether interference with public employment motivated by several considerations, some of which are constitutionally impermissible and some of which are not, violates the federal Constitution.

3. Whether the doctrine enunciated by this Court in several cases*—that one who lies to the Government may not resist punishment *for the lie* on the ground that the question which elicited the lie could not constitutionally have been asked—should be extended to situations in which applicants for public employment conceal their homosex-

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* *United States* v. *Kapp*, 302 U.S. 214, 217 (1937); *Kay* v. *United States*, 303 U.S. 1, 6 (1938); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Bryson* v. *United States*, 396 U.S. 64 (1969).

uality in completing their employment applications and thereafter suffer employment discrimination because they are homosexuals. Specifically, whether the doctrine of those cases should be applied where:

a. Punishment is imposed not for the concealment of information, but for a different, constitutionally impermissible reason.

b. It is doubtful that the question asked on the employment application sought the information which the applicant did not disclose.

c. There was no way that the employee could protect his constitutional right of privacy other than nondisclosure of the information.

4. Whether the denial of a constitutionally required administrative hearing is cured because the victim is afforded a *de novo* trial in federal court.

5. Whether removing a public school teacher from his classroom teaching position because he is a known homosexual violates his constitutional rights of privacy and freedom of association.

STATEMENT OF THE CASE

Petitioner, Joseph Acanfora, III, is a public school teacher and a homosexual. Upon graduating from college, he was hired to teach in the Montgomery County, Maryland, school system. Within a month, respondents discovered that he was a homosexual, and immediately transferred him out of his classroom teaching position into an office job. Respondents refused Acanfora's repeated requests that he be reinstated to the classroom. He thereupon filed the instant lawsuit seeking reinstatement to his classroom teaching position. During the pendency of the lawsuit, respondents advised him

that his employment would not be renewed for the following year. The decision below—denying Acanfora any relief—poses issues of great significance.

College Days

Acanfora entered Pennsylvania State University in 1968, and majored in education. In his junior year, he joined, and soon became Treasurer of, the Homophiles of Penn State, a newly formed campus organization dedicated to protecting the civil and constitutional rights of homosexuals and increasing public understanding of homosexuality. When the University refused to grant official recognition to the organization, four of its members, including Acanfora, instituted legal action to compel such recognition. That action, which ultimately was successful, received considerable local publicity, in the course of which Acanfora acknowledged that he was a homosexual.

At the time that this acknowledgment became public, Acanfora was fulfilling a student teaching assignment at a public junior high school near the University. That school suspended his student teaching status upon learning of his homosexuality. Acanfora thereupon instituted legal action seeking reinstatement as a student teacher, and obtained an immediate court order granting such reinstatement. He successfully completed the student teaching assignment, and graduated from Penn State in June, 1972.

As his senior year was coming to a close, Acanfora applied for certification to teach in Pennsylvania. The question whether a homosexual could have the requisite "good moral character" necessary for certification became a subject of great controversy, and the matter was referred to the Pennsylvania Secretary of Education for decision. With his Pennsylvania status in this undecided posture, Acanfora sought and obtained employment as a teacher in Montgomery County, Maryland.

Employment in Montgomery County

In April, 1972, Acanfora applied for employment with the Board of Education of Montgomery County, Maryland. The application form which he filled out did not inquire whether he was a homosexual. It asked for a list of his "professional, service and fraternal organizations," and for a list of "extracurricular activities" he had engaged in as a student. He did not list his membership in the Homophiles of Penn State in response to either question.

At trial herein Acanfora explained his reason for omitting mention of the Homophiles from his employment application:

> "[I]t was based primarily on the experience I had just had with the State College Area School District [the student teaching position]. I realized I had just completed four years of training to become a teacher and was judged perfectly qualified; and I realized had I put down the Homophiles of Penn State as an organization or an extracurricular activity that I would not be given a chance to even go through the normal application process for a teaching job; that I would not be considered on an equal par with all other applicants and, in fact, would guarantee that I would not receive any sort of teaching job. So, I decided not to put it down so that I might be able to be judged on an equal par with everyone else."

On May 19, 1972, Acanfora was interviewed by a personnel specialist in the Department of Personnel for the Montgomery County Schools. Following the interview, the personnel specialist filled out an "interview and recruitment form" which is a standard part of each applicant's file. Acanfora was rated above average in each of the seven categories contained on the form (appearance, personality, verbal expression, knowledge of subject area,

enthusiasm for teaching, references, and scholarship). In the "comments" section, the interviewer described Acanfora as "an above average earth science applicant." However, the interviewer had acquired a subjective "gut feeling" during the interview that Acanfora might be a homosexual, and so he added the following comment on the form: "Principal *must* interview before contracting; reservations."

Despite this caution, Acanfora was hired without further interviewing by the Assistant Principal of Parkland Junior High School in Rockville, Maryland, and entered into a one-year teaching contract. He was one of 719 new teachers hired in Montgomery County in 1972, out of 10,000 applicants.

Acanfora commenced his duties as an eighth grade earth science (geology) teacher on August 29, 1972. His teaching performance was judged entirely satisfactory by his supervisor.

On Friday, September 22, 1972, the Pennsylvania Secretary of Education called a press conference to announce that he had decided to certify Acanfora. That weekend, news articles appeared in the New York Times and the Washington Evening Star-News reporting the decision of the Pennsylvania Secretary of Education, and noting that Acanfora was now teaching in Montgomery County.

On Monday, September 25, the principal of Acanfora's school addressed a memo to the Deputy Superintendent of Schools, Donald Miedema, recommending that Acanfora "be considered for removal from his teaching position as soon as possible . . . in anticipation of the disruption which can materialize when this becomes known in the community." Miedema, in turn, addressed a memo to the Board of Education advising that "one of the alternatives which we are exploring is the reassignment of Mr. Acanfora, with full salary, to a position that does not require contact with youngsters."

On the following day, Miedema addressed a letter to Acanfora informing him that he had been transferred from his classroom teaching position to "a temporary alternate work assignment" in the headquarters building "while we gather information and assess the circumstances relating to this matter." The letter stated that the transfer was "in no way to be construed as punitive action."

At trial, Miedema explained the factors which prompted him to transfer Acanfora. The newspaper stories reporting Acanfora's certification had recounted his suspension from his student teaching position and the controversy which had attended his request for certification, and Miedema wished to investigate the facts underlying the suspension and delay in certification. Additionally, Miedema was "concerned" that Acanfora might be "an activist, advertised homosexual." Finally, Miedema was worried about "community concern and reaction" to the newspaper disclosures that a homosexual was teaching in the school.

Acanfora's "temporary alternate work assignment" proved to be an office job, specially created for him, in which his duties largely were "make-work." In that position, Acanfora not only was denied the opportunity to teach, but also was deprived of the opportunity to gain experience and receive evaluations which are critical to a teacher's ability to secure renewal of teaching employment beyond the first year. Although Acanfora's salary was not reduced, the district court found that the transfer breached the "clearly implied promise of continued employment in a classroom teaching capacity for the duration of [his] contract." (*App.* 28).

Thereafter, respondents took steps to assure that Acanfora would have no contact whatsoever with students. The junior high school needed to have him return to the school to assist in preparing his former students' grades, but he was instructed not to arrive at the school until the students

had left for the day. On another occasion, when he requested the opportunity to participate in a teacher workshop—an important means by which young teachers are able to enhance their career development—he was told that he could not attend because some students would be present.

Although Acanfora performed the office work to which he was transferred, he repeatedly requested that he be reinstated to his classroom position. These requests were denied, Acanfora being advised that the transfer would remain in effect pending investigation, but that the transfer was "in no way to be construed as punitive action."

In fact, as the district court found, the investigation conducted by respondents was "cursory" (*App.* 28). Miedema wrote to Penn State University and to the Secretary of Education for the State of Pennsylvania requesting information about Acanfora's suspension from his student teaching position and the controversy concerning his certification. Penn State responded that Acanfora had "successfully completed the student teacher assignment", and that the brief suspension therefrom had been motivated by his joining the lawsuit to obtain accreditation of the Homophiles, a suspension which all concerned had recognized to be an invasion of Acanfora's constitutional rights and which had been quickly corrected. The Secretary of Education responded that Acanfora's performance as a student and as a student teacher had been satisfactory in all respects, and that he had deemed Acanfora to be of "good moral character" in deciding to certify him. Both responses were received by Miedema in late October.

At no time throughout the "investigation" which was the ostensible reason for the "temporary" transfer, did school authorities make any inquiry concerning Acanfora's conduct as a classroom teacher at Parkland Junior High School, nor was he offered or provided a hearing of any kind.

Although the "investigation" admittedly was completed

upon receipt of the letters from Pennsylvania, and although those letters contained nothing but praise for Acanfora, respondents made no move to reinstate him to the classroom.

The transfer of Acanfora became a subject of great public interest, both locally and nationally. Acanfora accepted invitations to appear on several radio and television programs including CBS' "60 Minutes", which devoted a 20-minute segment to the case. The substance of his remarks in all those appearances was three-fold: that employment discrimination against homosexuals was regrettable, that he would never discuss his sexual orientation with students in or out of school, and that he hoped that greater public understanding of homosexuals would develop (*App.* 4, 15.)

Proceedings in the District Court

On November 7, 1972, Acanfora instituted this lawsuit against the Board of Education, the Superintendent (Elseroad), and the Deputy Superintendent (Miedema), under 42 U.S.C. § 1983. Jurisdiction was founded on 28 U.S.C. §§ 1343(3), 1343(4), and 1331. The complaint alleged (1) that the transfer had been visited for constitutionally impermissible reasons, and (2) that Acanfora had been denied procedural due process. An extensive trial ensued.

Much of the trial was devoted to eliciting the facts outlined above. Acanfora testified regarding the philosophy which guided him in his professional role as a teacher. He explained that in his view it would be wholly inappropriate for a teacher to discuss his sexual orientation with students. He would not, and had not, discussed any aspects of sexuality either with students or fellow faculty members. He would not advocate, and had not advocated, that any other person participate in homosexual activities. Asked how, if he were reinstated, he would respond to students who might inquire about his homosexuality, Acanfora testified

that he would tell students that he did not inquire into their personal lives and that he wished them not to inquire into his.

Acanfora's supervisor testified that his teaching performance had been wholly satisfactory. Students of Acanfora testified that he was a popular and effective teacher and that they hoped he would be reinstated. Indeed, students and faculty alike had sponsored petitions urging respondents to reinstate him. The record contains no evidence that any students, parents, or faculty members objected to his reinstatement.

In addition to testimony concerning the facts, both sides introduced expert testimony concerning the possible effects of Acanfora teaching. The experts were unanimous that there is generally no danger in homosexuals teaching in the public schools. However, respondents' experts contended that the return of Acanfora to the classroom might conceivably be dangerous because of the conjunction of two additional facts: (1) as a result of the publicity, his students would be aware of his homosexuality, and (2) he taught at a grade level in which students were entering adolescence. In their view, if Acanfora was an effective and popular teacher he would constitute a "role model" for his students. The experts feared that a "relatively few" students who enter adolescence with "extreme emotional disturbances" might be so impressed with Acanfora as a teacher that they would seek to emulate him in all respects, and thus decide to become homosexuals. The experts likened their view that Acanfora be excluded from the classroom to an "innoculation program": even though only a "handful of individuals" might be affected, he should be excluded. They acknowledged that their concerns were wholly speculative, that there was no relevant data on the subject, and that there is no known instance of a homosexual teacher, simply because he was known to be a homosexual, having an adverse effect on even a single adolescent.

Acanfora's experts disagreed with this speculation, advancing several reasons why Acanfora's impressiveness as a teacher would not result in students becoming homosexuals to emulate him.

The Superintendent of Schools, Dr. Elseroad, testified that he opposed reinstatement of Acanfora, for three reasons: (1) Acanfora had "withheld information on his application" i.e. his membership in the Homophiles of Penn State, (2) employment of a known homosexual in the classroom "increases the risk of having a good model available for students in the public schools", and (3) because Acanfora's homosexuality "has become widely-known and highly publicized," returning him to the classroom "would involve that school in a swirl of controversy . . ."

On May 1, 1973, after the trial but prior to the district court's decision, respondents notified Acanfora that his employment would not be renewed for the 1973-74 school year. The notification did not state the reasons for non-renewal, but its issuance came only two weeks after Dr. Elseroad's testimony as to the reasons why he did not believe Acanfora should be reinstated to the classroom. The district court reopened the record, at Acanfora's request, to admit the non-renewal notice into evidence.

The District Court's Opinion

The district court found it "quite clear from the evidence that the essential reason for the transfer was that Acanfora is an admitted homosexual"(*App.* 13, see also *App.* 29), and that "the Board of Education would not knowingly hire a homosexual" (*App.* 13). "The Board has in no way attacked Acanfora's classroom performance, nor has it charged Acanfora with bringing up the subject of homosexuality in the school environment. The evidence is that he is competent and that he did not discuss his private life while at school" (*App.* 13).

Declaring that "the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectible interests", the court ruled that one's right to be a homosexual is protected by the First Amendment's freedom of association and by the right of privacy enunciated by this Court in, *inter alia, Roe* v. *Wade,* 410 U.S. 113 (1973) (*App.* 21-25).

The court concluded, therefore, that Acanfora could be removed from the classroom, and his protected interests thus transgressed, only if there were an overriding state interest justifying that action. The only evidence which had been proffered by respondents going to that issue was the testimony of their experts, and accordingly the court recounted all of the expert testimony in great detail (*App.* 16-20). The court concluded that respondents had not sustained their burden of proving an overriding state interest. While it would be "premature to state definitively that Acanfora's presence in the classroom would have no deleterious effect," the risk, albeit "not illusory," "does not seem as great or as likely as defendants have assumed" (*App.* 20). The court concluded that "the board of education's policy of not knowingly employing any homosexuals is objectionable" (*App.* 28); that "mere knowledge that a teacher is homosexual is not sufficient to justify transfer or dismissal" (*App.* 34); that a teacher need not hide his homosexuality in order to retain his teaching position (*App.* 34); that the transfer was "arbitrary" and "without legal justification as matters then stood" (*App.* 35); and that the transfer was a "transgression" by the respondents (*App.* 36).

The district court also held that Acanfora had been denied procedural due process. Acanfora had a "clearly implied promise of continued employment in a classroom teaching capacity for the duration of [his] contract", and thus a property interest which could not be taken away without procedural due process. Additionally, the precipi-

tous transfer was "an implicit allegation that his homosexuality determines unfitness to teach" (*App.* 35), and thus interfered with his liberty interests. Since defendants transferred him without any prior investigation or hearing, and thereafter conducted only a "cursory investigation" without even then providing him any hearing, he was denied procedural due process (*App.* 28).

Despite these rulings, the district court held that Acanfora was entitled to no relief for any of the constitutional violations committed against him. With respect to the substantive violations, the court held that Acanfora's post-transfer appearances on radio and television programs disqualified him from entitlement to relief. Those appearances "were not reasonably necessary" for "self-defense", and would likely spark unnecessary controversy regarding the subject of "homosexuality and the classroom" (*App.* 34-35):

> "Accordingly, despite the initial transgression of the defendants, the Court can not grant plaintiff the relief for which he prays. Plaintiff's public activities as herein described are not 'protectable' and the Court cannot at this time characterize the refusal to reinstate plaintiff or renew his contract as arbitrary or capricious under either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. (*App.* 36).

With respect to the procedural due process violations, the district court thought them cured by the *de novo* trial which Acanfora received in his lawsuit: "The parties have shifted their attention to the plenary hearing in this forum" (*App.* 29).

The Court of Appeals' Decision

On appeal, the court below concluded that Acanfora's post-transfer public appearances were protected by the First Amendment, and that "they do not justify either the action

taken by the school system or the dismissal of his suit [by the district court]" (*App.* 3-4).

Nevertheless, "without reaching Acanfora's claim that his denial of a teaching position is unconstitutional, we affirm the district court, but on different grounds" (*App.* 2). In the view of the court below, Acanfora "is not entitled to relief because of material omissions in his application for a teaching position" (*App.* 2).

The court found controlling a series of decisions in which this Court and other courts of appeals have held that one who is prosecuted or otherwise punished for lying to the Government may not defend by attacking the constitutionality of the question which elicited the lie.[1] Acanfora had argued that these cases were inapposite "because the school officials transferred him on account of his homosexuality, not the omission from his application" (*App.* 7). The court acknowledged, as the district court had found, that the transfer was *not* motivated by the omission from the application. Nevertheless, it found the cases controlling for two reasons. First, to limit the cases to prosecution or punishment for lying would constitute "an unduly restrictive application of the principles expressed" in those cases (*App.* 8). Second, respondents should not be "prejudiced" by their failure to rely upon the omission as a motivation for transferring Acanfora, for at that time they only suspected that the omission was deliberate and it was not until trial that the suspicion was confirmed (*App.* 8-10). The court noted that at trial the Superintendent had testified that the omission was one of the reasons which made him

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[1] *United States* v. *Kapp*, 302 U.S. 214, 217 (1937); *Kay* v. *United States*, 303 U.S. 1, 6 (1938); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Bryson* v. *United States*, 396 U.S. 64 (1969); *Rodriguez* v. *Seamans*, 463 F.2d 837 (D.C. Cir. 1972), petition for cert. dismissed 409 U.S. 1094 (1973); *Williams* v. *United States*, 434 F.2d 1346, 1354 (Ct. Cl. 1970) (Nichols, J., concurring).

unwilling to *reinstate* Acanfora, and concluded that this was sufficient to warrant application of the "lying to the Government" cases (*App.* 9-10).

With respect to the procedural due process issue, the court below merely reiterated the district court's reasoning that, as there had been a full hearing in court, the failure to furnish an administrative hearing was cured (*App.* 8).

REASONS FOR GRANTING THE WRIT

The court below upheld a transfer which it assumed to be motivated by a constitutionally impermissible reason, because there existed another ground, admittedly not the one which actually motivated the transfer, which in the court's view justified keeping Acanfora from the classroom. That disposition contravenes well-established principles governing the resolution of constitutional claims, as we demonstrate in Part II. Additionally, the court below failed to provide any remedy for a denial of procedural due process, because it believed that the provision of a *de novo* trial in federal court cured the violation. That holding squarely conflicts with a recent decision of the Court of Appeals for the Third Circuit, as we shown in Part III.

This case has a greater significance, however, than the precise legal issues it poses, important as those are. For this case will likely affect the lifestyles of hundreds of thousands, perhaps millions, of public employees who happen to be homosexuals, and it is this consideration which we first address in Part I.

I

The court below has held that public employees who are summarily removed from their jobs upon discovery that they are homosexuals are disqualified from challenging the constitutionality of that action if, at the time of hire, they con-

cealed their membership in homosexual organizations. That decision will likely alter the lives of an enormous number of homosexuals.

Although precise statistics are not available, it is generally recognized that there are millions, perhaps tens of millions, of homosexuals in the United States.[2] Until very recently, homosexuals traditionally concealed their sexual orientation —they remained "in the closet"—and in that manner avoided confronting the myriad problems, including risk of employment loss, attendant upon disclosure of their homosexuality.[3] It is thus virtually certain that there are enormous numbers of public employees who, in filling out applications for such employment, concealed their membership in homosexual organizations.[4]

The past few years have seen a major sociological development: a growing willingness on the part of homosexuals to "come out of the closet", to live their lives openly rather than secretively.[5] The decision below is likely to reverse that

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[2] The Kinsey report, in 1948, concluded from an extensive survey that 4 per cent of white males were exclusively homosexual throughout their adult lives, and that an additional 6 per cent were exclusively or predominantly homosexual for at least three years between the ages of 16 and 55. Kinsey, Pomeroy and Martin, *Sexual Behavior in the Human Male,* page 651 (W. B. Saunders Co. 1948). This data is still regarded as the most reliable available. National Institute of Mental Health, *Task Force on Homosexuality,* page 17 (GPO, 1972).

[3] Weinberg and Williams, *Male Homosexuals: Their Problems and Adaptations,* pages 26-30, 177-196, 287-289 (Oxford Univ. Press, 1974); Katz, *Coming Out Fighting,* in The Nation, July 2, 1973, page 25; Altman, *Homosexual: Oppression and Liberation* (Outerbridge and Dienstfrey, 1973).

[4] It is generally believed that the highest incidence of concealment of homosexuality is among those employed in governmental and educational institutions, as those are the areas where employment discrimination against homosexuals has been most prevalent. Weinberg and Williams, op. cit. *supra* n. 3, pages 227-228.

[5] See sources cited in n. 3 *supra.*

trend. This case attracted nationwide publicity, and was closely followed in journals devoted to the rights of homosexuals.[5a] And the lesson taught by the decision below is that homosexuals who are public employees, and who concealed their homosexuality when applying for that employment, have no protection against job loss should they now acknowledge their homosexuality. If the price of acknowledgement is not merely the need to confront potential employment discrimination against homosexuals *per se,* but a threshhold disqualification from even challenging the constitutionality of that discrimination, only the financially independent and the foolhardy will opt to abandon their secretive lifestyles.

There was expert testimony in the instant case, and there appears to be general acknowledgment among experts, that concealment of one's homosexuality—living "in the closet" —is psychologically harmful, and that the emotional well-being of homosexuals is served by their acknowledgment of their sexual orientation.[6] The decision below compels homosexuals to elect between their emotional well-being and their financial well-being, and that Hobson's choice is one which should not be imposed without prior review by this Court.

The most devastating aspect of the decision below is its chilling effect. Aware of the judicial fate which befell Acanfora, others will opt for continued secrecy. Because that choice is almost inevitable, this Court cannot wait to see

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[5a] The homosexual publication with the largest national circulation is *The Advocate,* which reported the decision below in its March 13, 1974 issue, at page 9. *The Advocate* also reported Acanfora's decision to seek certiorari in its April 24, 1974 issue, at page 8. The decision below was also reported in the May, 1974 issue of *Gay Liberator,* under the caption "Does Your Boss Know You're Gay?"

[6] (*App.* 18-19); Weinberg and Williams, op. cit, *supra* n. 3, pages 12, 177-196, 287-289; Weinberg, *Society and the Healthy Homosexual,* pages 124-125 (Anchor Press/Doubleday, 1973); Katz, op. cit. *supra* n. 3; Altman, op. cit. *supra* n. 3; Gould, *What We Don't Know About Homosexuals,* in New York Times Magazine, Feb. 24, 1974, page 62.

whether future litigation spawns a direct conflict among Circuits; that conflict may never develop, for *this* decision will deter potential future litigants from taking the first step —acknowledgment of their homosexuality—without which this issue cannot arise.

II

In reaching its decision, the court below thought it was bound by a series of decisions of this and other courts in which persons who lied to the Government, and who thereafter were punished *for that lie,* were held disqualified from defending on the ground that the question could not constitutionally have been asked in the first place.[7] Those cases are inapposite for several reasons, and in ignoring the distinctions the court below violated several well-established constitutional principles.

A. The court below ignored an important factual difference between those cases and the instant case. In all of those cases, punishment (whether in the form of criminal prosecution or interference with employment) was imposed for the very act of lying. The criminal cases all were prosecutions for defrauding the Government. The employment cases involved termination of employment for lying on employment forms. The instant case, by contrast, involves an employment sanction visited not for the misconduct, if any, which attended the completion of the employment application, but rather for the underlying fact which that "misconduct" concealed, i.e. petitioner's homosexuality. As the district court

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[7] *United States* v. *Kapp,* 302 U.S. 214 217 (1937); *Kay* v. *United States,* 303 U.S. 1, 6 (1938); *Dennis* v. *United States,* 384 U.S. 855 (1966); *Bryson* v. *United States,* 396 U.S. 64 (1969); *Rodriguez* v. *Seamans,* 463 F.2d 837 (D.C. Cir. 1972), petition for cert. dismissed 409 U.S. 1094 (1973); *Williams* v. *United States,* 434 F.2d 1346, 1354 (Ct. Cl. 1970) (Nichols, J., concurring).

found on overwhelming evidence,[8] and as the court below acknowledged, Acanfora was transferred because he is a homosexual, not because he concealed that fact on his employment application.

The cases which the court below thought controlling expressly distinguished cases such as this where punishment is visited not for the "lie" but for the underlying fact which it concealed. In *Dennis,* a prosecution for conspiracy to file false affidavits under Section 9(h) of the Labor-Management Relations Act, this Court, after holding that the defendants could not resist prosecution on the ground that their lies were made in response to questions which the Government could not constitutionally ask, carefully added (384 U.S. at 867):

> "This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional."

This distinction was reiterated in *Bryson,* 396 U.S. at 68. And in *Rodriguez,* in upholding the discharge of a public employee for lying on his employment application, the District of Columbia Circuit distinguished those cases in which it had held that employees cannot be discharged for membership in the communist party (463 F.2d at 837):

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[8] Miedema testified to the reasons which prompted the transfer, and did not list the omission from the application (see p. 7 *supra*). Acanfora's principal recommended the transfer in anticipation of the community reaction to the newspaper stories disclosing that a homosexual was teaching in the school. The original letter to Acanfora transferring him, and the subsequent letters explaining why he would not be reinstated, all contained the assurance that the transfer "is in no way to be construed as punitive action," and attributed the transfer to a desire to investigate the challenge to his teaching credentials in Pennsylvania. Miedema's report to the Board of Education, and the subsequent restrictions placed upon Acanfora, manifested a desire to prevent his having any "contact with youngsters."

> "We have had a great deal of litigation involving both freedom of association and loyalty oaths in recent years. Of course, we note that there is a significant difference in those cases and the instant case, as this is a suit brought by a party who, *as a result of his falsification of forms and not as a result of his prior memberships and associations,* lost his position with the Air Force." (Emphasis added).

As explained in *United States* v. *Manfredonia,* 414 F.2d 760, 765 n. 5 (2nd Cir. 1969):

> "In all of these cases the constitutionality of the statute pursuant to which the answers were given was held to be irrelevant. . . . This was so because the perjury or false swearing prosecution was one to punish the defendant for false swearing or for fraud on the Government, not one to enforce the invalid statute or regulation pursuant to which the answers were given."

B. The decisions which *do* control this case are those which hold that a public employee cannot be punished for exercising a constitutional right, even though other grounds exist which, had they actually motivated the punishment, would have been constitutionally permissible. See, e.g., *Perry* v. *Sindermann,* 408 U.S. 593, 596, 598 (1972); *Fluker* v. *Alabama State Board of Education,* 441 F.2d 201, 209 (5th Cir. 1971); *Cook County College Teachers Union* v. *Byrd,* 456 F.2d 882, 888 (7th Cir. 1972), *cert. denied* 409 U.S. 848 (1972); *Gieringer* v. *Center School District No. 58,* 477 F.2d 1164, 1166 (8th Cir. 1973); *Langford* v. *City of Texarkana,* 478 F.2d 262, 266 (8th Cir. 1973). The identical doctrine has evolved in private employment cases arising under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3): a discharge motivated by union activities is unlawful, even though valid grounds existed for which the employee might have been discharged. *J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292,

300 (2nd Cir. 1967), *cert. denied* 389 U.S. 1005 (1967); *Singer Company* v. *NLRB*, 371 F.2d 623, 624 (8th Cir. 1967); *NLRB* v. *Murray Ohio Mfg. Co.*, 326 F.2d 509, 517 (6th Cir. 1964).

Indeed, there are numerous NLRB decisions applying this principle to situations where the employee has flagrantly falsified his employment application, but the NLRB concludes that the reason motivating the discharge was the employee's union activities, not the falsification.[9] Similarly, arbitrators under collective bargaining agreements recognize that an employee's material falsification of his employment application constitutes "just cause" for discharge,[10] but they will not uphold a discharge in fact prompted by other, impermissible reasons simply because the employer can prove that there was such a material falsification.[11]

The decision below, in sustaining a transfer motivated by constitutionally impermissible reasons because another, arguably permissible reason existed, thus conflicts with numerous decisions of this Court and of other circuits, indeed with a heretofore impregnable principle of constitutional law.

C. The court below thought its approach justifiable because in its view respondents were not sufficiently informed of Acanfora's "misconduct" when they transferred him, and thus should not be "prejudiced" for having failed to be mo-

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[9] *Rowe Furniture Corp.*, 200 NLRB No. 1, 81 LRRM 1569, 1571-72 (1972); *Collins & Aikman*, 195 NLRB No. 26, 79 LRRM 1327 (1971); *Weston Shoppers' City, Inc.*, 189 NLRB 234 (1971); *Jacksonville Paper Co.*, 182 NLRB 6 (1970); *Photoswitch, Inc.*, 99 NLRB 1366 (1952).

[10] See cases digested under headnote 118.6484 in BNA, *Labor Arbitration Cumulative Digest and Index.*

[11] See, e.g., *Freuhauf Trailer Co.*, 58 L.A. 1169, 1171 (1972); *Armak Abrasives Division*, 60 L.A. 509, 511 (1973); *Goodyear Tire and Rubber Co.*, 52 L.A. 55, 56-57 (1968); *Gardner-Denver Co.*, 51 L.A. 1019, 1022 (1968).

tivated by that misconduct when they decided upon the transfer. The court found sufficient the fact that Superintendent Elseroad listed the omission from the employment application as one of the three reasons for not wanting to *reinstate* Acanfora. But even if this approach of measuring respondents' conduct by their reasons for opposing reinstatement rather than their reasons for making the transfer could pass constitutional muster—a doubtful proposition[11a]—its application in the instant case conflicts with principles enunciated by courts of appeals in five other circuits. For the other two reasons listed by Elseroad for opposing reinstatement both related to Acanfora's homosexuality (see p. 11, *supra*), and thus by his own testimony his opposition was motivated *in substantial part* by reasons which the court below assumed to be unconstitutional. And five circuits have held that interference with public employment motivated *even in part* by constitutionally impermissible reasons cannot stand. *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988, 995 (2d Cir. 1973); *Skehan* v. *Bloomsburg State College,* No. 73-1613 (3d Cir., May 3, 1974) (slip op., p. 12)[12]; *Fluker* v. *Alabama State Board of Education,* 441 F.2d 201, 210 (5th Cir. 1971); *Cook County College Teachers Union* v. *Byrd,* 456 F.2d 882, 888 (7th

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[11a] The approach of the court below on this point conflicts with *Rainey* v. *Jackson State College,* 481 F.2d 347, 352 (5th Cir. 1973). In *Rainey,* the Fifth Circuit held that, once it is determined that employment discrimination was visited for constitutionally impermissible reasons, the "taint . . . carrie[s] forward . . . by inference and [is], without more, sufficient to make out a prima facie case" that subsequent employment discrimination was imposed for the same impermissible reasons. Accordingly, the public employer has the burden "to overcome this" by proving that those reasons played no part in the subsequent discrimination. Here, the Superintendent, far from disclaiming that Acanfora's homosexuality contributed to his unwillingness to reinstate Acanfora, testified that it *was* part of his motivation.

[12] Because this decision has not yet been officially reported, ten copies of the slip opinion have been lodged with the Clerk.

Cir. 1972), *cert. denied* 409 U.S. 848 (1972); *Gieringer* v. *Center School District*, 477 F.2d 1164, 1166, n. 2 (8th Cir. 1973); *Langford* v. *City of Texarkana*, 478 F.2d 262, 266, 268 (8th Cir. 1973).[13]

Because the decision below creates a conflict on a principle of constitutional law which has heretofore been unanimously followed by the circuits, it deserves review by this Court.

D. The line of cases which the court below deemed controlling is distinguishable in other respects as well, and the question whether the principles there enunciated should be extended to the quite different situation confronting homosexuals is an important one which should be decided by this Court.

(1) Each of the cases relied upon by the court below involved a lie in response to a specific question asked by the Government. In the instant case, the school board did not inquire on the employment application whether the applicant was a homosexual. Indeed, in our experience that question is never asked on employment applications. If it were, the applicant could challenge the question as facially unconstitutional (i.e. as violative of his right of privacy)

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[13] This doctrine parallels similar rules applied in other contexts. The Labor Act condemns a discharge motivated even partially by anti-Union animus, *NLRB* v. *Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954); *NLRB* v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (2nd Cir. 1962), *cert. denied* 373 U.S. 950 (1963); *NLRB* v. *West Side Carpet Cleaning Co.*, 329 F.2d 758, 761 (6th Cir. 1964). Likewise, a general verdict of guilty in a criminal case cannot stand if one of several possible bases for the verdict is violative of the First Amendment. *Eaton* v. *City of Tulsa*, 42 L.W. 3538, n. * (March 25, 1974); *Batchellar* v. *Maryland*, 397 U.S. 564, 569-71 (1970); *Stromberg* v. *California*, 283 U.S. 359, 363-68 (1931). The rationale for this rule is that where punishment has been imposed on the basis of both permissible and impermissible grounds, it is impossible to determine whether it would have been imposed solely on the basis of the permissible ground, *Eaton, supra.*

without having to disclose his homosexuality. Because the question is *not* asked directly, homosexuals confront a more perplexing dilemma, as the facts of the instant case demonstrate. The application asked only that the applicant list the "professional, service, and/or fraternal organizations of which you are a member" and "extracurricular activities you have participated in as a student." It is well-established that a school board may not ask applicants for employment to list *every* organization to which they belong. *Shelton* v. *Tucker,* 364 U.S. 479 (1960). In recognition of this principle, the respondents asked applicants to list their membership only in "professional, service and/or fraternal organizations", i.e. those memberships which directly bear upon an applicant's qualifications for employment. The application pointedly did *not* ask for membership in political and other non-job-related organizations, thus reflecting appropriate respect for the rights of applicants not to disclose such affiliations. Nor could an applicant be expected to understand that the inquiry about "extracurricular activities" was designed to elicit organizational memberships not sought in the question specifically addressed to such memberships. Acanfora testified that he knew respondents would have regarded his membership in the Homophiles as "significant" (*App.* 5), but that is a far cry from knowing that the information was called for by the employment application. Thus here, unlike the cases upon which the court below relied, it is doubtful whether there was any misrepresentation at all.

(2) Yet another reason why this case is different from those upon which the court below relied is that the homosexual has no meaningful way, short of forfeiting his constitutional right of privacy, to challenge the propriety of the questions asked in the employment application. If an application asked for a listing of membership in political and other non-job-related organizations, the applicant could mount an attack upon the questions as facially unconstitutional—a challenge which would be bound to succeed in

light of *Shelton* v. *Tucker*. But a facial challenge to the question actually asked Acanfora, limited as it was to "professional, service, and/or fraternal organizations," would have been preposterous. Only by disclosing the organization whose membership he wished to conceal could Acanfora have mounted a respectable constitutional attack. And by that disclosure he would have forfeited the very right to privacy which he sought to protect by non-disclosure.

Of course, Acanfora might have listed the Homophiles, and then brought suit challenging as unconstitutional the school board's failure to hire him. That approach, however, would have been inadequate for two reasons. First, as noted, Acanfora's right of privacy would have been forfeited by the disclosure. Second, he would never have been able to prove that the decision not to hire him was motivated by his homosexuality. Montgomery County had 10,000 applications for teaching employment in 1972, and hired only 719 teachers. Absent an extraordinary concession by the school officials, Acanfora would never have been able to rebut the presumption that he was simply among the more than 90 percent of applicants who were deemed less qualified than the small percentage hired.

One of the critical underpinnings of the line of cases relied upon by the court below is that one may not lie with impunity when a reasonable means for protecting his constitutional rights is available (there, by challenging the questions as unconstitutional on their face). Such availability was considered in *Dennis* to be critical to the principle enunciated, 384 U.S. 865, n. 11:

> "In short, petitioners chose not only to evade the statute, but to ignore judicial proceedings likely to clarify their rights. . . . *In this context,* any claim that it is too burdensome to test these statutes in the courts is not entitled to consideration." (Emphasis added).

Here, as we have explained, Acanfora had no similar option. There was no practical way he could protect his constitutional right of privacy other than that which he chose.

The implications of the decision below are so harsh, for so substantial a segment of the populace, that they should not be allowed to stand absent compelling necessity. Whether the line of cases relied upon by the court below should be extended to the quite different circumstances confronting homosexuals is a question which should be decided by this Court.

III

The disposition of the procedural due process issue by the court below directly conflicts with a subsequent decision of the Court of Appeals for the Third Circuit. Although apparently agreeing with the district court's holding that Acanfora was denied procedural due process, the court below concluded that the violation had been cured by the provision of a *de novo* hearing in federal court upon the substantive constitutional claims advanced by Acanfora. A similar conclusion was reached by the Fifth Circuit on a 2-1 vote in *Ferguson* v. *Thomas,* 430 F.2d 852, 858 (5th Cir. 1970), cf. *Id.*, pp. 860-861 (dissenting opinion of Judge Thornberry).

These decisions directly conflict with the Third Circuit's subsequent decision in *Skehan* v. *Bloomsburg State College* No. 73-1613 (May 3, 1974).[14] In *Skehan,* the district court had held, as did both courts in the instant case, that a failure to afford a constitutionally required administrative hearing was cured because the teacher had advanced a First Amendment claim which was adjudicated on the merits in the district court. On that basis, the district court awarded the teacher one dollar as the remedy for the procedural due process violation. The Third Circuit reversed, with the following analysis:

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[14] Because *Skehan* is not yet officially reported, we have lodged ten copies of the slip opinion with the Clerk.

"[W]hile it was proper for the court to consider [the teacher's First Amendment] claim . . ., it was not proper to substitute the finding it made for the in-house hearing which the institution should have afforded. . . . Such a retrospective substitution of the district court's judgment for that of the administrative hearing officers seriously undermines the hearing requirement. A district court cannot exercise the discretion which is vested in an administrative hearing board, nor can it bring to the dispute the same expert knowledge of the academic environment which should enlighten the deliberations of an academic hearing agency. A board of his academic peers might regard Skehan's scheduling imbroglio as far more trivial than would a district judge. A board of his academic peers might say he is guilty of misconduct, but he should not be fired for that kind of misconduct. The district judge could not exercise such discretion. Furthermore, if we countenance the practice of making findings which the institution should have made, a substantial incentive for affording procedural due process prior to contract termination will be removed. The result will be to place considerable unreviewable discretion in the hands of the administrators by permitting discriminatory application of the availability of pre-termination hearings. Those discriminated against will be forced to the expense, inconvenience and delay of a lawsuit to get what remains of the due process hearing which should have been provided by the state at the administrative level in the first instance. If the due process protection of contract rights mandated by *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann, supra,* is to be meaningful, the sanction for deprivation of that protection must be something more than was awarded in this case." (Slip op., pp. 14-15).

The Third Circuit thereupon cited a series of decisions of

this Court mandating reinstatement and/or backpay as the appropriate remedies for the denial of a procedurally required hearing.[15]

This square conflict among the circuits on an issue which is bound to arise frequently should be resolved by this Court.

CONCLUSION

For the reasons set forth hereinabove, this petition for writ of certiorari should be granted.

Respectfully submitted,

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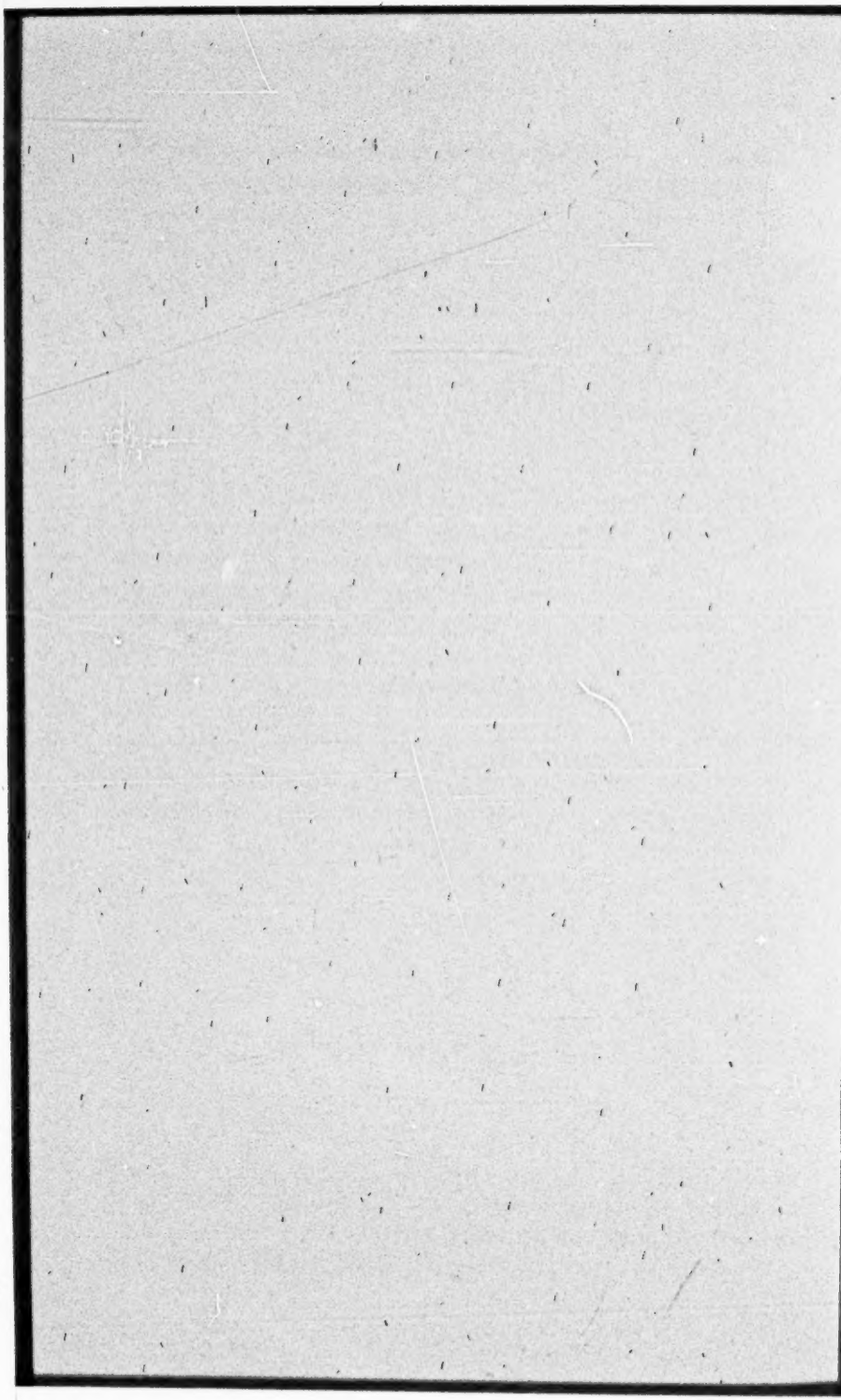
[15] "See, e.g., *Greene* v. *United States*, 376 U.S. 149 (1964); Silver v. *New York Stock Exchange*, 373 U.S. 341, 365-66 n. 18 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535, 545-46 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957)." (*Id.*, p. 15).



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 73-1788

JOSEPH ACANFORA, III,
Appellant,

v.

BOARD OF EDUCATION OF MONTGOMERY COUNTY, et al.,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued November 6, 1973
Decided February 7, 1974

Before CLARK, Associate Justice,* BOREMAN, Senior Circuit Judge, and BUTZNER, Circuit Judge.

Michael H. Gottesman (George H. Cohen, Darryl J. Anderson, Dennis D. Clark, and Bredhoff, Cushman, Gottesman and Cohen on brief) for appellant; Robert S. Bourbon for appellees; (Melvin L. Wulf, Marilyn G. Haft and Elsbeth Bothe on brief for American Civil Liberties Union, amicus curiae); (Stephen J. Pollak, John D. Aldock, David Rubin, Joel D. Gewirtz, and Shea and Gardner on brief for National Education Association, Maryland State Education Association, and Montgomery County Education Association, amici curiae).

* Supreme Court of the United States, retired sitting by designation.

BUTZNER, Circuit Judge:

Joseph Acanfora III appeals from an order of the district court denying him reinstatement to a teaching position in Montgomery County, Maryland. The district court held that the school officials wrongfully transferred Acanfora to a non-teaching position when they discovered that he was a homosexual, but it denied relief because of Acanfora's subsequent press and television interviews. We hold that Acanfora's public statements were protected by the first amendment. We conclude, however, that he is not entitled to relief because of material omissions in his application for a teaching position. Consequently, without reaching Acanfora's claim that his denial of a teaching position is unconstitutional, we affirm the district court, but on different grounds.

I.

While Acanfora was a junior at Penn State University he joined an organization known as the Homophiles of Penn State, which had as its purpose the development of public understanding about homosexuality. Acanfora not only attended Homophile meetings, but he served as the group's treasurer and joined other members in bringing a lawsuit that established it as an official university organization. His public acknowledgement of homosexuality ultimately led to his suspension from a student teaching assignment, but a state court promptly ordered that he be reinstated. When Acanfora applied for teacher certification, however, Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation.

In the meantime, Montgomery County school officials, unaware that Acanfora was a homosexual, employed him as a junior high school science teacher. They didn't learn of his homosexuality until several weeks after school opened in the fall, and only then as a result of a widely publicized

press conference at which the Pennsylvania Secretary of Education announced favorable action on Acanfora's application for teacher certification in that state. Shortly after this disclosure, the Montgomery County deputy superintendent of schools transferred Acanfora, without reduction in pay, from teaching to administrative work in which he had no contact with pupils. When the school officials did not accede to Acanfora's demands that he be returned to his classroom assignment, he commenced this action.

II.

Following his transfer to an administrative position, Acanfora granted several press and television interviews. The district court characterized the television programs as tending to spark controversy, and noted an element of sensationalism in Acanfora's remarks. It held that Acanfora's appearances were not reasonably necessary for self-defense, but instead exhibited an indifference to the bounds of propriety governing the behavior of teachers. Consequently, the court, ruling that the refusal to reinstate Acanfora or renew his contract was neither arbitrary nor capricious, dismissed his suit.

The Supreme Court has explained the general principles that govern the intricate balance between the rights of a teacher to speak as a citizen on public issues related to the schools and the importance the state properly attaches to the uninterrupted education of its youth. Balancing these interests, the court has ruled that a teacher's comments on public issues concerning schools that are neither knowingly false nor made in reckless disregard of the truth afford no ground for dismissal when they do not impair the teacher's performance of his duties or interfere with the operation of the schools. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). Cf. *Johnson* v. *Branch,* 365 F.2d 177 (4th Cir. 1966), *cert. denied* 385 U.S. 1003 (1967). Acanfora's public statements must be judged by these constitutional principles, and not, as

the district court suggested, by the common law doctrine of self-defense to defamation.

At the invitation of the Public Broadcasting System, Acanfora appeared with his parents on a program designed to help parents and homosexual children cope with the problems that confront them. Acanfora also consented to other television, radio, and press interviews. The transcripts of the television programs, which the district court found to be typical of all the interviews, disclose that he spoke about the difficulties homosexuals encounter, and, while he did not advocate homosexuality, he sought community acceptance. He also stressed that he had not, and would not, discuss his sexuality with the students.

In short, the record discloses that press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest about which reasonable people could differ, and Acanfora responded to their inquiries in a rational manner. There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the first amendment and that they do not justify either the action taken by the school system or the dismissal of his suit. Cf. *Tinker* v. *DesMoines Independent Sch. Dist.*, 393 U.S. 503 (1969); *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968); *James* v. *Board of Educ.*, 461 F.2d 566 (2d Cir.) *cert. denied* 409 U.S. 1042 (1972).

III.

On his application for a teaching position in the Montgomery County Schools, Acanfora responded to a request for information about his professional, service and fraternal organizations by mentioning only his student membership in the Pennsylvania State Education Association. In re-

sponse to a request for information about his extracurricular activities, he listed swimming, bowling, student council, magazine and newspaper staffs, honor society, and Naval Reserve Officers Training Corps. He made no mention of his membership and official position in the organization known as the Homophiles of Penn State. Nevertheless, he verified that the information he submitted was accurate to the best of his knowledge.[1] His omission of the Homophiles was not inadvertent. To the contrary, he realized that this information would be significant, but he believed disclosure would foreclose his opportunity to be considered for employment on an equal basis with other applicants.

Acanfora protests that refusal to employ or retain him as a teacher violates the first and fourteenth amendments. He contends that the school system cannot defend on any deficiency in his application because it was his homosexuality, not omissions from the application, that led to the unconstitutional discrimination against him. The school officials admit that if Acanfora had revealed his affiliation with the Homophiles they would not have employed him. They assert, however, that Acanfora's intentional omission of his connection with the Homophiles bars his attack on the constitutionality of the school system's employment policy. In its written opinion, the district court dealt only inferentially with this aspect of the school system's defense. It found that to avoid rejection, Acanfora intentionally did not disclose his

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[1] The application form for employment in the Montgomery County school system, which Acanfora signed, contained the following paragraph:

> "Read Carefully Before Signing:
> The information as submitted on this application is accurate to the best of my knowledge, I concur in the above statements and requirements. I understand that falsification of any information submitted on this application shall be cause for dismissal from service. I have signed this application form in the presence of a notary public, whose signature and seal appear below."

homosexuality in his application. It also found that the essential reason for Acanfora's transfer was his admitted homosexuality. However, it expressed no conclusion about the effect of Acanfora's misrepresentation, resting its decision instead on his public appearances after he was transferred.

IV.

In a number of criminal cases, the Supreme Court has held that a defendant charged with fraud may not challenge the constitutionality of the statute which required him to furnish the information that he misrepresented. Thus, in *United States* v. *Kapp,* 302 U.S. 214, 217 (1937), a defendant who was indicted for furnishing false information to secure benefits under the Agriculture Adjustment Act could not assert the invalidity of the Act as a defense. Similarly, a person charged with making false statements in connection with a loan lacked standing to question the constitutionality of the Home Owners Loan Act. *Kay* v. *United States,* 303 U.S. 1, 6 (1938). The subject was critically reexamined in *Dennis* v. *United States,* 384 U.S. 855 (1966), and *Bryson* v. *United States,* 396 U.S. 64 (1969), which dealt with the offense of filing false non-Communist affidavits to satisfy the requirements of the Taft-Hartley Act. Reaffirming earlier cases, the *Dennis* Court refused to consider the defendant's attack on the constitutionality of the statutory requirement for the affidavit:

> "It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to chal-

lenge. This is the teaching of the cases." 384 U.S. at 866.

In *Bryson,* the Court rejected the argument that the misrepresentation was of no consequence because the government could not constitutionally elicit the information:

> "But after Dennis it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." 396 U.S. at 72.

The principles stated in *Kapp, Kay, Dennis,* and *Bryson* have not been confined to criminal cases. In at least two instances, *Rodriguez* v. *Seamans,* 463 F.2d 837 (D.C. Cir. (1972) *petition for cert. dismissed* 409 U.S. 1094 (1973) and *Williams* v. *United States,* 434 F.2d 1346, 1354 (Ct. Cl. 1970) (Nichols, J., concurring), courts have sustained discharges of government employees for furnishing false information pertaining to their qualifications despite the fact that the government's questions were considered to be an unwarranted intrusion into constitutionally protected rights.

Acanfora asserts that the principles governing the foregoing cases do not apply to his situation because the school officials transferred him on account of his homosexuality, not the omission from his application. He relies on the principle that review of administrative action must be confined to the reasons assigned by the administrative agency. See e.g., *Securities and Exchange Com.* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947); *Johnson* v. *Branch,* 364 F.2d 177 (4th Cir. 1966) *cert. denied* 385 U.S. 1003 (1967). This argument fails, however, because it lacks a clear factual

basis and because it is predicated on an unduly restrictive application of the principles expressed in *Dennis* and *Bryson*.

Before instituting this action, Acanfora did not exhaust his administrative remedies, and the school officials conducted no formal hearing. The district court, however, declined to tax either party with these procedural lapses. It ruled that a remand for an administrative hearing "would be pointless as the substantive rift has widened and the parties have shifted their attention to a plenary hearing in this forum." Therefore, the district court did not purport simply to review administrative action of the school officials. At the instance of both parties, it conducted an extensive trial on the merits of the case, admitting a great deal of evidence that had not been considered administratively. Under similar circumstances, we have ruled that a remand for an administrative hearing was unnecessary. See e.g., *Horton* v. *Orange County Board of Educ.*, 464 F.2d 536 (4th Cir. 1972); *Barker* v. *Hardway*, 399 F.2d 638 (4th Cir. 1968).[2] Accordingly, the consequences of Acanfora's intentional omission of significant information from his application must be determined by examining the entire record of the district court proceedings, not just the administrative file that was compiled before the suit was instituted.

After Montgomery County school officials learned that Acanfora was a homosexual, the deputy superintendent wrote him that he was being transferred to a non-teaching position "while we gather information and assess the circumstances of the matter." At the same time, the school officials realized that Acanfora's application was incomplete because he had failed to include information about his affiliation with the Homophiles. They adverted to this omission during the course of this litigation, and it is apparent that

[2] We do not, however, approve of the parties' failure to use administrative remedies to resolve their differences. An effective grievance procedure might have eliminated this expensive, protracted litigation.

they suspected Acanfora had purposely misled them.[3] However, during the administrative phase of the controversy, before institution of the suit, they had no proof that his act was intentional. Not until Acanfora testified at the trial could the school officials confirm their suspicions that he consciously omitted the Homophiles from his application for a teaching position to avoid rejection.[4]

It was Acanfora's testimony that furnished the school system a factual basis for the defense of misrepresentation. After Acanfora testified, the superintendent of schools un-

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[3] For example, in an affidavit opposing Acanfora's motion for summary judgment, a school official asserted:

"This litigation by reason of plaintiff's false application, is contrived in every sense of the word. He ought not to bootstrap his way into a constitutional issue out of such untruthfulness. Had he been truthful, defendants would not have been involved in this litigation as they would not have hired him in the first place."

[4] The deputy superintendent of schools testified:

Q In other words, would it be fair to say that neither the decision to transfer him nor the decision not to return him to the classroom had anything to do with his competency as a teacher?

A I think the central issue, by that point in time, and we are talking about late October and November, and so on, was that what appeared to us to be the fact that he was an advertised, activist homosexual.

I think there was one other point that I had mentioned earlier. At least I thought I did, that was of concern to us, and that was why Mr. Acanfora had not indicated his membership in the Homophile Society on his application form, and I don't know that I ever really knew the answer to that until in this courtroom yesterday when Mr. Acanfora indicated that he had consciously decided to withhold that information.

Q Do you recall him further indicating that, in his judgment, had he written Homophile Society of Penn State University down as a social, fraternal or extracurricular activity on his application that in his judgment, that would have ended his opportunity for employment with the Montgomery County school system?

A Yes, I recall him mentioning that. That was new information to me, also.

equivocally assigned the conscious withholding of information as a reason for his unwillingness to reassign Acanfora to a teaching position.[5] We conclude, therefore, that the school system should not be prejudiced because it did not include in the administrative file, as a reason for denying Acanfora a teaching position, information about his motives that were known to Acanfora but unknown to the school officials until he testified.

Not every omission of information in an employment application will preclude an employee from attacking the constitutionality of action taken by the governing body that employs him. But here Acanfora wrongfully certified that his application was accurate to the best of his knowledge when he knew that it contained a significant omission. His intentional withholding of facts about his affiliation with the Homophiles is inextricably linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers. Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. "When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the government in which the effort to . . . mislead is made are without constitutional sanction." *Kay* v. *United States,* 303 U.S. 1, 6 (1938). AFFIRMED.

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[5] The superintendent of schools testified:

Q Under the circumstances of this matter, as you understand them, would you reinstate Mr. Acanfora at this time?

A No.

Q What are your reasons for not doing so?

A You mean reinstate or reassign?

Q Reassign to the classroom setting.

A There are several reasons. Mr. Acanfora did not provide and consciously withheld information on his application which he was required to provide in the employment process. . . ."

United States District Court

for the

District of Maryland

[Issued May 31, 1973]

[Caption Omitted]

MEMORANDUM OPINION AND ORDER

In an action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970) with jurisdiction founded on 28 U.S.C. §§1343(3), 1343(4), and 1331 (1962, 1966), plaintiff Joseph Acanfora, III, a teacher under contract with the Montgomery County Board of Education, alleges that his transfer on September 26, 1972, from a classroom teaching position to a non-teaching position in the Department of Curriculum and Instruction resulted from the discovery of plaintiff's admitted homosexuality and, as such, violated his constitutional rights.

Defendants include the Board of Education—as well as its President, Vice-President and members individually—the Superintendent of Schools, and the Deputy Superintendent of Schools, all of Montgomery County, Maryland.

Acanfora attended public schools in New Jersey, and, after graduation from high school, entered Penn State University in the autumn of 1968. Having initially pursued studies in meteorology, he switched to an education major in his junior year, inclined more to a profession where he might work with people. Approximately at the same time, in the autumn of 1970, a homophile group was organized on campus, dedicated to ending discrimination against homosexuals and developing understanding of homosexuality. Acanfora, aware of his own homosexuality, joined and became Treas-

urer. In January, 1971, the group sought official recognition from the University. When the request was approved by the student government but denied by the administration, legal action followed in which Acanfora agreed to participate as a plaintiff, along with three other students. In the spring of 1971, during press interviews relating to the litigation, he stated publicly his homosexuality, and emphasized his belief in the unconstitutionality of the action of the University. While on assignment as a student teacher in the State College Area School District, Acanfora taught for six and one-half weeks before suspension by the Dean of the College of Education in late February, 1972, on the grounds of membership in the homophile organization. Following a new lawsuit, he was reinstated and completed his student teaching assignment, receiving a satisfactory evaluation. Plaintiff alleges he did not discuss homosexuality with students or colleagues, inside or outside the classroom.

In the spring of 1972, Acanfora applied for a teaching position with a number of different school systems, including Montgomery County. Following several interviews, he received an offer to teach eighth-grade earth science at Parkland Junior High School in Montgomery County. The offer was followed by a contract dated July 13, 1972 for the 1972-73 school year. Acanfora intentionally did not disclose his homosexuality during the interviews or in the official application form which provides for disclosure of membership in organizations and extracurricular activities, motivated by a desire to avoid rejection in light of his student-teaching experience in Pennsylvania.

During the spring of 1972, Acanfora also applied for certification to teach in Pennsylvania, a prerequisite to which is a finding of "good moral character." After a hearing at which plaintiff explained the professional relationship necessary between student and teacher, the intention never to discuss or encourage homosexuality, and the belief that homosexuals should gain legal rights and be free from specific hatred and

fear, a special six-member panel split evenly and turned the matter over to the Pennsylvania Secretary of Education, John Pittenger. Plaintiff's exhibit 4 (PX-4).

On August 29, 1972, plaintiff began teaching at Parkland and initial reports from the resource teacher in science (equivalent to the Chairman of the Department), indicate that his performance was satisfactory. On September 22, 1972, Secretary Pittenger held a news conference in Harrisburg to announce that Acanfora would be certified in Pennsylvania. News reports of the tie-breaker appeared in the New York Times and Washington Post; and on September 26, 1972, having learned of the reports and consulted colleagues, Deputy Superintendent Dr. Donald Miedema in the absence of the Superintendent and with no opposition from the Board of Education transferred plaintiff to a non-teaching position, at no loss in salary, pending investigation.

The subsequent investigation can best be described as cursory, including a brief discussion with the psychiatrist for the school system. It is quite clear from the evidence that the essential reason for the transfer was that Acanfora is an admitted homosexual. Moreover, Dr. Miedema stated that the Board of Education would not knowingly hire a homosexual. That Acanfora is the only member of the Department of Curriculum and Instruction lacking more than a baccalaureate degree and several years professional experience is simply corroborative of this policy. The Board has in no way attacked Acanfora's classroom performance, nor has it charged Acanfora with bringing up the subject of homosexuality in the school environment. The evidence is that he is competent and that he did not discuss his private life while at school.

The transfer, in addition to sparking this litigation necessarily had an impact within the school community. Students and faculty separately petitioned for reinstatement. [Several teachers in the Montgomery County School System called plaintiff to encourage him, but noted that they would re-

frain, under the circumstances, from associating themselves with him and his cause.]

More significant, as has been the pattern in controversial cases of recent years, plaintiff took his case to the people. He accepted offers, before and after the institution of this lawsuit on November 7, 1972, to discuss his case on a number of local and national television and radio shows, and with several newspapers, including:

1. A 15-minute interview on the Metropolitan Washington television program "Panorama" with Maury Povich, on October 26, 1972.

2. A 45-minute interview on the Metropolitan Washington WWDC radio program "Empathy" on November 1, 1972.

3. An interview on the educational television show "How Do Your Children Grow" on the Public Broadcasting System, the second week of November, 1972.

4. Participation in a 20-minute segment on the Columbia Broadcasting System national news review "60 Minutes" on February 25, 1973.

5. Telephone interviews with The Montgomery County *Sentinel* and The Montgomery County *Tribune*.

Transcripts of the two national television broadcasts are a part of the record. PX-7, 8.

The edition of "How Do Your Children Grow" is unique in that, moderated by psychiatrist Eda Leshan, it deals only peripherally with plaintiff's transfer and this litigation. Designed to educate children and parents in situations similar to that of the Acanfora family, the program gives thoughtful and serious insight into a problem which merits consideration. The segment on "60 Minutes," representative in subject matter of the other media coverage, albeit the most recent, focuses on the circumstances of this particular lawsuit.

In the course of his television exposure, Acanfora stresses

again his disinclination to discuss matters of sexuality in the school environment, saying:

> No, I have never brought my private life into the classroom—my sexuality or any other part of my private life into the classroom—or discussed sexuality with any of my students, either here or in Pennsylvania. And so, in fact, I would say I've never even talked to other teachers about it, and there was no way—known in the school system that I was gay until the school system decided to transfer me. . . .
>
> I never went out of my way to say, 'Here I am, a homosexual. What are you going to do with me?'
>
> Transcript of "60 Minutes," p. 12.

Neither is Acanfora inclined to hide his homosexuality.

> Many of my friends have asked me why I'm doing this, why I just don't go some place and be a teacher and not let the gayness enter into it at all. But the fact is that I'm gay, just like the fact is that other teachers are straight or heterosexual. But I'm sure a heterosexual teacher isn't going to live his life a complete lie and hide what he is and I have no intentions of doing that either. I have every right to be what I am. I have every right to be a teacher. And I plan on doing both.
>
> *Ibid.* p. 8

The defendants declined to participate in media coverage, or to alter the decision to deny plaintiff reinstatement and have refused to renew the 1972-73 contract.

The evidence further establishes that Parkland has an equal representation of sexes on the faculty and that a student in plaintiff's earth science class would be under his tutelage for one fifty-minute period every day out of seven or eight class periods, including homeroom.

To complete the story, plaintiff recently became a member and delegate of the gay caucus of the National Educa-

tion Association, in anticipation of the upcoming convention. He has attended meetings, but is not active, in the Washington Gay Activists Alliance, which pleaded his cause to the Montgomery County Board of Education. Finally, plaintiff has received his certification to teach in Maryland.

The Court appreciates the substantial expert evidence directed toward the effect of a known homosexual teacher on students in the circumstances of this case. The experts have impressive curricula vitae, which are a part of the record and will not be reproduced in detail here. (It is noteworthy that defendants did not contact their experts until shortly before trial.)

Dr. Reginald Spencer Lourie, a pediatrician and child psychiatrist, Professor of Child Health and Development at George Washington University Medical School and Director of Psychiatry at the Hillcrest Children's Center in Washington, emphasized the importance of the adolescent period as the stage at which a child overcomes the transitional homosexuality typical of the preadolescent period. For the population of children with bisexual tendencies, estimated at about 3%, it is a period of decision or choice. Convinced that a known homosexual teacher might serve as a model for such children, Dr. Lourie suggested that the removal of plaintiff would result in freer choice. An awareness that homosexuality may specifically cause mental and emotional problems in a culture which stigmatizes it underlies this assumption, and that of most experts, that prevention of homosexuality is a worthwhile goal. Dr. Lourie relied on his years of clinical and academic experience to support his argument that Acanfora might serve as a model for adolescents. He referred to no data on point, but noted that the theoretical determinants of homosexuality are still substantially a matter of controversy. In the context of social reality, he analogized the removal of Acanfora from the classroom to a vaccination, admitting that one does not know precisely how many subjects are affected.

That there are other determinants of homosexuality and of mental and emotional disturbance, including some kinds of relations between heterosexual teachers and students, does not change the conclusion. Dr. Lourie maintained that one cannot escape the cultural definition of homosexuality as abnormal and the need to give children the utmost opportunity to be essentially normal in this important phase of life.

He narrowed his opinion, however, to known homosexuals who teach at the junior high school level, excluding private homosexuals, and known homosexuals who teach at the elementary or high school level. In other words, homosexuality does not preclude competence.

Dr. Felix P. Heald, Professor of Pediatrics at the University of Maryland Medical School, took essentially the same position for the same reasons. He suggested it would be impossible for the students to separate Acanfora's homosexual identity from his identity as an earth science teacher, and that Acanfora's presence would necessarily give rise to an undue influence, as would the presence of a heterosexual teacher who makes known facts concerning private life. Dr. Heald, moreover, would draw the line at junior high and high school.

Dr. Stanford B. Friedman, Professor of Pediatrics and Psychiatry at the University of Rochester Medical School, and to assume a similar position at the University of Maryland as Director of the Human Development program, took a sharply different position. Noting the paucity of data on point, he opined that the influence of Acanfora would be marginal in the complex school and home environment of the student, and in addition felt that Acanfora's role as a teacher could drastically be distinguished from his role as a homosexual in terms of model choice. In other words, the real problem for Dr. Friedman is the projection of societal and parental fear on to the teacher. In support of his view, Dr. Friedman alluded to the greater importance of parent-child relationships in the early childhood years, demonstrat-

ed by the research of Dr. John Money. He furthermore attributed importance to the idea that any teacher may pose a risk to a particular portion of the student population. For example, a bisexual child might feel threatened by a very masculine heterosexual teacher. As to the model theory, in addition to noting the existence of many other possible models, Dr. Friedman observed that the students might react that Acanfora is a good teacher in spite of his homosexuality because of the strong peer group and social pressure directed against this minority. Given that there is much to be learned about adolescent psychosexuality, he would not single out any one hypothesis as the more likely.

Dr. William R. Stayton, a psychologist, holder of a doctorate in theology, and instructor in Family Psychology at the University of Pennsylvania Medical School, also questioned the conclusion that Acanfora's presence would have a deleterious effect on students. From his experience in counseling persons regarding homosexuality, and given his acceptance of the view that persons are sexually predisposed by the age of five or six, Dr. Stayton adds that Acanfora would have a beneficial effect by serving as a role-model for homosexuals, aiding bisexuals in bringing into the open their problems with the appropriate counselor, and possibly resolving them. In other respects, he echoed in substance the opinion of Dr. Friedman.

Dr. John Money, Professor of Medical Psychology and Associate Professor of Pediatrics at the Johns Hopkins University Medical School, nationally known for his research on the etiology of homosexuality, or "the differentiation and dimorphism of gender identity," took the position that a person's sexual orientation is determined by the age of five or six. Dr. Money documented and explained his research in *Man & Woman, Boy & Girl,* Johns Hopkins University Press, Baltimore and London, 1972, with Anke A. Ehrhardt as coauthor. Analogizing the development of sexual identity to a program or relay, Dr. Money traced the "message" from the

genes and chromosomes, to the gonads, to the hormonal sections of the gonad cells, to the body and brain, and through the early childhood environment. As in the teaching of a language, each component plays its part. The child-rearing stage serves normally to show the child the importance of identifying with the parent of the same genetic sex and complementing the opposite. Dr. Money's findings are impressive and appear to expand the frontiers of knowledge of the differentiation of gender identity.

Corresponding to these findings is his opinion that, at the eighth grade level, Acanfora is not likely to cause a higher incidence of homosexuality. As to possible psychological consequences to bisexual and homosexual adolescents Dr. Money began by noting that students already face a wide variety of imputs, including social, parental and peer group taboos on homosexuality. A bisexual may then possibly feel a sense of freedom to disclose his anxiety to a parent or physician and thereby gain the best chance to turn to heterosexuality. In addition, although a homosexual teacher is no more likely than a heterosexual to serve as a model generally, and less likely to be sexually attractive to a homosexual, Acanfora might serve the function of demonstrating to students that a homosexual can meaningfully participate in society. This is obviously constructive for homosexuals and also encourages a more reasonable attitude from heterosexuals.

In discussing the cause of homosexuality in prisons or schools for boys, Dr. Money stressed the importance of distinguishing homosexual behavior as a substitute for normal sexual drives from homosexuality as a gender identity. In concluding an essential predisposition by the age of five, he directed his remarks toward the latter.

He also noted that from three to five per cent of the adult population is homosexual to varying significant degrees. This appears to be the rough consensus of experts.

Finally, counsel have supplied a copy of the *National Institute of Mental Health Task Force on Homosexuality: Fi-*

nal Report and Background Papers (1972). Evelyn Hooker's article on *Homosexuality,* written in 1968, expresses the view that a combination of biological, cultural, psychodynamic, structural and situational factors cause and impinge on homosexuality. Professor Edwin M. Schur in his article, *Sociocultural Factors in Homosexual Behavior,* underlines those titled factors. The Task Force also includes an earlier article of Dr. Money, along with a supplement from his latest book. The Task Force recommends a thoughtful reassessment of employment policies, but does not specifically deal with the case of homosexual teachers. There were several dissents to the recommendations generally on the ground that not enough is known about the causes, characteristics and effects of different kinds of homosexual behavior to reach reasoned scientific conclusions.

Upon the above expert evidence, while Dr. Money's research and opinion deserve special recognition, it would be premature to state definitively that Acanfora's presence in the classroom will have no deleterious effect. It is fair to state that factors present in the embryonic and early childhood stages appear to have the greatest impact, but that the book is by no means closed on the possible behavioral and sociocultural impact stressed by Drs. Lourie and Heald and Professor Schur. A finding that sexual orientation is in large part predisposed by age five or six does not preclude an incremental effect of a teacher on a bisexual adolescent. Although speculation has drifted to the numerous possible positive and negative effects different kinds of teachers may have on particular students, the Court cannot ignore the specific danger noted by defendant's experts. The danger does not seem as great or as likely as defendants have assumed, but it is not illusory. In conjunction with the attitudes of parents and interested citizens in the school community, the instruction of an eighth-grade earth science class by a known homosexual poses sensitive problems, both for relationships among students and between students and parents.

I.

The Superintendent of Schools in each Maryland county may transfer a teacher as the needs of the school system require, pursuant to Article 77, §62 of the Maryland Annotated Code (1969 Replacement Volume). While the informed judgments of educational administrators usually deserve due deference, see *San Antonio School District* v. *Rodriguez,* 41 U.S.L.W. 4407 (U.S. March 21, 1973), the law does not permit the impairment of constitutionally protected interests. *Perry* v. *Sindermann,* 408 U.S. 593 (1972), *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). A state may not condition government employment on the surrender of a constitutional freedom. *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960). It is "self-evident" in this Circuit that objections by a Board of Education to the exercise of personal and associational liberty, for example with respect to civil rights activism, would not justify non-renewal of a contract so long as the activities do not interfere with the educational process. *Johnson* v. *Branch,* 364 F.2d (4th Cir. 1966). And it is no defense that the Board merely transferred Acanfora, for the measurement of abridgment of constitutional rights is not confined to dollars and cents. To rule otherwise would facilitate subtle circumvention of the law so carefully developed by the highest court of this land.

II.

The guarantee of liberty in the Fourteenth Amendment is greater than the sum of particular rights guaranteed in the first eight amendments. The substantive doctrine of due process, advancing this proposition, originated in cases sustaining the individual right to contract and to work against unreasonable state legislation. *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897); *Lochner* v. *New York,* 198 U.S. 45 (1905); *Adair* v. *United States,* 208 U.S. 161 (1908); *Coppage* v. *Kansas,* 236 U.S. 1 (1915); *Adkins* v. *Children's*

Hospital, 261 U.S. 525 (1923); See Jacobson, *Federalism and Property Rights,* 15 N.Y.U.L.Q. Rev. 319 (1938). Opposed to this doctrine is the thought that the Constitution does not dictate any particular economic theory, that courts should not sit as "super legislatures," subjectively deciding on fundamental fairness. This also interrupted, but did not destroy, the growth of the idea that in matters touching personal liberty, the Fourteenth Amendment expresses an integral philosophy of liberal democracy, not simply an amalgam of differentiated clauses. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Palko* v. *Connecticut,* 302 U.S. 319 (1938); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Roe* v. *Wade,* 41 U.S.L.W. 4213, (U.S. Jan. 22, 1973). The quest for judicial objectivism, proposed as most nearly attainable by the incorporation of the *particular* language of the first eight amendments by the Fourteenth, proved illusory, for that language itself is subject to varying interpretation. See *Griswold, supra* (Harlan, J., concurring opinion) and cases there discussed. See, for example, *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Katz* v. *United States,* 389 U.S. 347 (1967). While a court must necessarily bear a sense of proportion, with respect to precedent and social mores, a rigidly restrictive theory of interpretation, avoiding the dangers of judicial activism, is open to criticism for abdication of the duty to expound the Constitution.

In this spirit, the Supreme Court has created a sphere of protectable interests, including, but not limited to, the interests specifically designated in the first eight amendments, as "essential to the orderly pursuit of happiness by free men." *Meyer, supra,* 262 U.S., at 399. It is noteworthy that this sphere includes the right to pursue a career, *Meyer, supra;* the right to freely associate for the promotion of political and social ideas, *Wiemann* v. *Updegraff,* 344 U.S. 183 (1952); *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957); *Shelton,*

supra; Keyishian, supra; Bruns v. *Pomerleau,* 319 F.Supp. 58 (D. Md. 1970); the right to procreate, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (Stone, C.J., concurring opinion); the right to marital privacy and choice, *Griswold, supra; Loving, supra;* and the right to control matters affecting reproduction, regardless of marital status, *Eisenstadt, supra; Roe, supra.* State action impinging on a protectable interest draws especially careful judicial review.

As autonomous and rational beings, individuals are capable of reasoned decisions in pursuit of chosen goals. Given man's imperfect knowledge, full freedom of thought and association is imperative for individual self-development and social progress. So long as the freedoms of others are not affected, a government intended to promote the life, liberty and happiness of its citizens must abstain from interference with individual pursuits, no matter how unorthodox or repulsive to the majority. As social animals, individuals necessarily place importance on friendships and relationships of trust. Hence the development of a right of privacy. *Griswold, Katz, Eisenstadt, Roe, supra.*

> Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.,* 337 U.S. 582 (1948) (Frankfurter, J., dissenting opinion). See *Roe, supra* (Stewart, J., concurring opinion).

In this context, the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty.

This case would be different if homosexuals were generically psychotic or suffering from such emotional disturbance as to impair everyday functioning. It is debated whether

homosexuality is a sexual character disorder resulting from abnormal development. See *Note, Government-Created Employment Disabilities of the Homosexual* 82 Harv. L.Rev. 1738, 1743 (1969), (cited hereafter as *Disabilities*); Fisher, *The Sex Offender Provisions of the New Maryland Criminal Code: Should Private Consenting Homosexual Behavior be Excluded.* 30 Md. L.Rev. 91, 100-02 (1970) (cited hereafter as *Sex Offender Provisions*). It is undisputed, however, that homosexuality *per se* does not preclude successful job performance. See *Norton* v. *Macy,* 417 F.2d 1161 (D.C. Cir. 1969), *Morrison* v. *State Board of Education*, 1 Cal.3d 314, 461 P.2d 375 (1969), *In Re Labady,* 326 F.Supp. 924 (S.D.N.Y. 1971), *Disabilities, supra; Sex Offender Provisions, supra.*

This case would likewise be different if homosexuality presented a threat to the survival of the species.

Accordingly, it bears restatement that

> . . . an opinion on a point of conduct, not supported by reasons, can only be one's personal preference, and if the reasons when given are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one. J. S. Mill, "On Liberty" 132 (reprinted in *The Six Great Humanistic Essays of John Stuart Mill,* Washington Square Press, New York, 1963)

Two important recent studies reached similar conclusions. The Wolfenden Report, prepared for the British Parliament by the "Committee on Homosexual Offenses and Prostitution" (1957) and enacted into law in 1967, dictates that private adult homosexuality not be a criminal offense.

> There remains one additional counter argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by

> society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. Wolfenden Report, at 48.

On a broader scale, a study of American penal law undertaken by the American Law Institute suggested exclusion from criminal law of all sexual practices not involving force, adult corruption of minors, or public offense. Absent harm to the secular community, this area is of distinct concern to spiritual authorities, in conformity with the spirit of separation of church and state. See Model Penal Code §207.5(1), Comment (Tent. Draft No. 4, 1955). Illinois and Connecticut were first to adopt this position, followed in substance by New York. See *Sex Offender Provisions, supra,* at 104-05.

The Court is cognizant that numerous states prohibit private, consenting homosexuality. Maryland arguably is among them, prescribing criminal sanctions for sodomy and unnatural or perverted sexual practices. Md. Ann. Code Art 27, §554 (1971 Replacement Volume). It is of great import, however, that despite the substantial activity, no reported case reveals the enforcement of this law against private homosexuality. See *Sex Offender Provisions, supra,* at 95-97. Such lack of enforcement is not peculiar to Maryland. *Project, the Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County,* 13 U.C.L.A. L.Rev. 643, 688-89 (1966); Ploscowe, *Sex Offenses in the New Penal Law,* 32 Brooklyn L.Rev. 274, 284 (1966). The sweeping invasion of privacy which would necessarily accompany enforcement explains this phenomenon, raising severe questions regarding the inner morality of a law beset by internal contradictions and a lack of congruence between official action and declared rule. See L. Fuller, *The Morality of Law,* 65-70, 81-90, Yale University Press (Rev. Ed. 1969). Assuming further no significant decline in homosexuality since the famous Kinsey re-

port, the law raises additional concern over the impossibility of compliance, contributing to contempt for the legal system. See L. Fuller, *op cit.* 70-79. A. Kinsey, W. Pomeroy, and C. Martin, *Sexual Behavior in the Human Male* (1948), *Morrison, supra.*

It is no less true now than when written in 1859 that although society no longer puts heretics and sinners to death, nor does it act so vigorously as to stamp them out, it cannot flatter itself as free from the stain of legal persecution. The *chief* harm in these laws is the perpetuation of social stigma, cramping mental development, cowing reason, and repressing human expression for fear of social disfavor. See J. S. Mill, *op cit.* 154-58.

Such are the differences in the nature of human beings that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness nor grow up to the mental, moral and aesthetic stature of which their nature is capable. *Ibid.* 192. Preservation of the *atmosphere* of freedom in an imperfect world is furthermore essential to the advancement of mankind. *Ibid.* 181. The practical application of these principles is most urgent for those who differ from the prevailing mode, for it is the majority which defines common conceptions and morality.

III.

Corollary to the proposition that ordered liberty protects private, consenting, adult homosexuality is the notion that discrimination directed at such activity is "suspect" under the Equal Protection clause of the Fourteenth Amendment.

Should the conclusion reached in Section II of this opinion be incorrect, however, it would be necessary to consider independently the application of the law of equal protection.

Speaking for four members of the Court, Mr. Justice Brennan recently announced that sex is a "suspect" classification, arguably joined by Mr. Justice Stewart in a brief concurring opinion. *Frontiero* v. *Richardson,* 41 U.S.L.W. 4609

(U.S. May 14, 1973). While from this, it does not necessarily follow that sexual preference is similarly "suspect" as a classification, the broad thrust of the opinion of the Court substantially supports extrapolation,

> . . . since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility' . . . *And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.* (Emphasis supplied, citation omitted.) *Frontiero, supra,* 41 U.S.L.W. at 4612.

Assuming, however, that the sense of history relied on by Mr. Justice Brennan to supplement this analysis would not support such an extension of the law, it is appropriate to restate the more usual standard of equal protection, that, at the very least,

> A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object [of the state action], so that all persons similarly circumstanced are treated alike. *Reed* v. *Reed,* 404 U.S. 71 (1971).

IV.

The principles basic to liberty are appropriate to the mature, reasoning individual. Society, however, has an interest in protecting children from themselves as they develop their ability to think and act independently in the surrounding culture. For the purpose of education, responsible officials and parents necessarily have considerable discretion.

It is true that state control of education runs a considerable danger of yielding to the dictates of the majority on matters deserving full academic discussion. Thus, the Supreme Court has found it necessary to protect freedom of academic discussion and expression of minority views on numerous occasions in recent years, especially in political matters. *Sweezy, supra; Keyisshian, supra; Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969), *Cohen* v. *California,* 403 U.S. 15 (1971). On matters beyond the sphere of academic or political expression, the Court indicated that speech would be protected absent a deleterious or disruptive effect on children or the educational process. *Pickering, supra.*

At the first level of analysis, it is entirely clear that if Acanfora's homosexuality had remained undiscovered to the general school community, there could have been no deleterious effect. For example, if Acanfora had admitted confidentially on his application that he is a homosexual, but that he had no intention of publicizing the fact, denial of employment for that reason would be unconstitutional. In this context, the Board of Education's policy of not knowingly employing any homosexuals is objectionable.

At the second level of analysis, the Court must consider the legitimacy of the transfer on September 26, in the context of the subsequent cursory investigation and the failure to provide first an administrative hearing.

A state educational institution must afford a transfer hearing to a teacher whom it has hired under formal contract with the "clearly implied promise" of continued employment in a classroom teaching capacity for the duration of that contract. See *Roth* v. *Board of Regents,* 408 U.S. 564 (1972), *Connell* v. *Higginbotham,* 403 U.S. 207, 208 (1971). It must likewise afford a hearing in order that the appellant might refute charges which tend to damage his reputation in the community. *Roth, supra.* While the facts

here are undisputed, the implications are open to controversy.

At this time, however, a remand for administrative procedural due process would be pointless, as the substantive rift has widened and the parties have shifted their attention to the plenary hearing in this forum. The prejudgment of the controversy by defendants casts doubt on the prospective fairness of such a procedure. Cf. *Kelly* v. *Board of Education of the City of Nashville,* 159 F. Supp. 272 (M.D. Tenn. 1958), *Amos Treat & Co.* v. *Securities and Exchange Commission,* 306 F.2d 260 (D.C. Cir. 1962); see the discussion in *Gibson* v. *Berryhill,* 41 U.S.L.W. 4576, 4581 (U.S. May 7, 1973).

The doctrine requiring exhaustion of administrative remedies by a plaintiff does not apply to this case. The cognate argument belatedly made by the defendants, that the plaintiff is estopped from raising procedural objections because of his failure to take advantage of an administrative complaint procedure operative for involuntary transfers, is insufficient since the burden under *Roth* is not on the teacher. Moreover, the effectiveness of this procedure is questionable. Defendants never apprised plaintiff of its existence and did not appear to be aware of it until the filing of post trial briefs.

As the matter stood on September 26, 1972, the transfer was occasioned by the fact that Acanfora became a *known* homosexual. The cause of the publicity was, in the immediate sense, independent of plaintiff's speech and action. There is no evidence that during the period of his employment prior to transfer, Acanfora made his homosexuality known to the school community.

While it might be argued that the newspaper reports can be traced ultimately to Acanfora's decision to join the homophile organization at Penn State as first cause, this Court is unwilling to penalize plaintiff for lawful membership in a college student group which led to publicized legal entanglement over certification in Pennsylvania. In other words, a

different standard will apply in this case to plaintiff's speech and action after his college graduation and the signing of the contract to teach.

V.

The analysis must finally stretch to the post-transfer publicity in which plaintiff had a role. If private, consenting adult homosexuality is "protectable," it follows from the First Amendment that public speech, organization and assembly in support of that goal by ordinary citizens is also protectable. This syllogism does not, however, encompass the definition of the boundaries of protectable speech and association of teachers, who hold a special position of trust and responsibility in the educational process.

The exchange of views in the market place of ideas occupies the most brilliant orbit in the constitutional solar system. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). Political thought is especially fundamental, and

> may indeed serve its best purpose when it induces a condition of unrest, creates dissatisfaction with things as they are, or even stirs people to anger.
> *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949).

Nor does freedom of speech stop at the schoolhouse door.

> . . . in our system undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom or expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance . . . . But our Constitution says we must take this risk.
> *Tinker, supra,* 393 U.S., at 508.

See also *James, supra; Massie* v. *Henry,* 455 F.2d 779 (4th Cir. 1972); *Cohen, supra.*

With this goes the caveat that,

> . . . the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of citizenry in general.
> *Pickering, supra,* 391 U.S., at 568.

Otherwise stated, the Board of Education has an interest in the regulation of activity detrimental to the educational process. Cf. *Quarterman* v. *Byrd,* 453 F.2d 54 (4th Cir. 1971).

Indeed, freedom of speech is subject to reasonable regulation as to time, manner and place; and speech which is "inseparable" from action does not enjoy the same degree of protectability.

Thus, the law does not protect "fighting words." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). The law permits reasonable regulation of political and labor demonstrations, *United States* v. *O'Brien,* 391 U.S. 367 (1968), *Cameron* v. *Johnson,* 390 U.S. 611 (1968), *Adderley* v. *Florida,* 385 U.S. 39 (1967), *Cox* v. *Louisiana,* 379 U.S. 559 (1965), *Giboney* v. *Empire Storage Co.,* 336 U. S. 490 (1949), See *Thornhill* v. *Alabama,* 310 U.S. 88 (1941), *Amalgamated Food Employees Local Union 590* v. *Logan,* 391 U.S. 308 (1968), *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) (Douglas, J., concurring opinion); reasonable control of noise, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949); and reasonable allocation of the scare resources of public broadcasting. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969).

Ever since Justice Oliver Wendell Holmes' classic illustration of the shout of "fire" in a crowded theater, the courts have struggled with the limits of the First Amendment and/or the boundary between speech and action. See *Schenck* v. *United States,* 249 U.S. 47 (1919). Despite the apparent

lack of connection, it is perhaps noteworthy that the "panic" of the crowded theater in the illustration has some similarity to the reaction of parts of the school community in this case.

The instruction of children carries with it special responsibilities, whether a teacher be heterosexual or homosexual. The conduct of private life necessarily reflects on the life in public. There exists then not only a right of privacy, so strongly urged by the plaintiff, put also a duty of privacy. It is conceded that it would be improper for any teacher to discuss his sex life in the school environment. Plaintiff has taken the position that he has not engaged, and will not engage, in such discussion. The more difficult question is the limitation on the outside activities of the plaintiff.

An evaluation of Acanfora's public appearances in the context of the educational process must recognize to a degree that homosexuality is *sui generis* in contemporary America. First of all, the subject of homosexuality is peculiarly sensitive and of special concern to the American family. This is not a question of race relations (*Johnson, supra*), of the wearing of armbands (*Tinker, James, supra*), of long hair (*Massie, supra*), or of the allocation of educational funds (*Pickering, supra*). The consensus of the experts and of the Task Force of the National Institute of Mental Health is that prevention of homosexuality is a desirable goal, essentially because of the cultural stigma and repression for which it is the target. Even assuming the antipathy of parents, and of school officials, to be unreasonably intolerant, the Court notes that immediate aggravation of anxiety and conflicts between students, parents, faculty and officials varies directly with the notoriety of this case and detracts from the educational process. Secondly, a difference of expert opinion exists as to the influence of a known homosexual teaching in junior high school on the differentiation of gender identity, especially of bisexuals. Thus, the fear of parents cannot be definitively characterized as "undifferentiated apprehension or fear of disturbance." *Tinker, supra.*

In a series of cases relating to the advocacy of revolution and/or violence by ordinary citizens, the Supreme Court has drawn a boundary in an analogously perplexing area of the law. After first taking the position, in essence, that active advocacy, as opposed to discussion, of violent revolution is subject to criminal sanctions—that the government need not wait until the *putsch* is about to be executed, the plans have been laid, and the signal executed—the court modified its holding to distinguish advocacy of abstract doctrine from advocacy in preparation for future violent action, or exhortation to immediate action. Compare *Dennis* v. *United States,* 341 U.S. 494 (1951) with *Yates* v. *United States,* 354 U.S. 298 (1957). The urging must be to do, rather than believe in, before the state may intervene. In *Brandenburg* v. *Ohio, supra,* the court restated the doctrine in broad language,

> . . . that the constitutional guarantees of free speech and free press do not forbid a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. 395 U.S., at 447.

As a result of the distinguishing obligations which a person assumes upon signing a contract to teach children, the standard must shift to accord with the goals of the educational process. The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process. Such speech is not within the bounds of the "protectable" and the Board of Education is not precluded from taking reasonable action with respect to it.

It is true that freedom of speech may best serve the political process, and political discussion within the educational process, when it induces a condition of unrest, stirs people to anger, or inspire fear. *Terminiello, Johnson, Tinker, supra.* It is likewise true that the promotion of legal rights for

homosexuals is a political undertaking. When undertaken publicly by a known homosexual teacher, however, upon the evidence presented in this case, it does not best serve the purposes of sexual adjustment, maturation and student-parent relationships in the educational context. These questions are charged with emotion and of such a delicate and sensitive nature that the injection of controversy tends to breed misunderstanding, alarm and anxiety.

As indicated earlier, mere knowledge that a teacher is homosexual is not sufficient to justify transfer or dismissal. In addition, the homosexual teacher need not become a recluse, nor need he lie about himself. Like any other teacher, he may attend public gatherings and associate with whomever he chooses. But a sense of discretion and self-restraint must guide him to avoid speech or activity likely to spark the added public controversy which detracts from the educational process.

This case does not involve an admission of homosexuality in response to an individual question put to the plaintiff, but rather the repeated, unnecessary, appearances on local and especially national news media. Granted that plaintiff did not *advocate* homosexuality, but concentrated on his opinion of the injustice and discrimination practiced against homosexuals in this country, his appearances nevertheless inevitably sparked additional controversy regarding the subject of homosexuality and the classroom. The point is that to some extent every teacher has to go out of his way to hide his private life, and that a homosexual teacher is not at liberty to ignore or hold in contempt the sensitivity of the subject to the school community. Indeed, it is the very lack of necessity or appropriateness for the public appearances which contribute substantially to their inflammatory character, and hence, to the likelihood of incitement or production of effects deleterious to the educational process.

The plaintiff advances the proposition, not without some grounds, that his public appearances amount to no more

than a *defense* of his legal rights against the arbitrary action of the defendants. As indicated earlier, the instantaneous and visceral reaction of the defendants merits no praise. While neither of the two sides may claim a monopoly on the proper exercise of discretion, plaintiff's offense lies in his exceeding the bounds of reasonable self-defense.

It was not reasonably necessary to plaintiff's defense, to try his case to the public. The concept of self-defense sweeps broadly across the common law. Elementary tort and criminal law dictates that one may take reasonable steps to defend his person and property against attack. See *Baltimore Transit Co.* v. *Faulkner,* 179 Md. 598 (1941), *Maddran* v. *Mullendore,* 206 Md. 291 (1955), *Brown* v. *State,* 6 Md. App. 631 (1969).

The decision to transfer plaintiff without a hearing is, at heart, the functional equivalent of an injury inflicted upon plaintiff's reputation, an implicit allegation that his homosexuality determines unfitness to teach. To defend reputation, one may publish, *in an appropriate manner and to the appropriate parties,* anything which *reasonably appears to be necessary* to respond to the defamation of another, including, of course, consultation of an attorney. See *Prosser, Law of Torts* §115, 786 (4th Ed. 1971). As Professor Prosser carefully indicates, however, the privilege is subject to abuse,

> . . . And this is as it should be. If the communication is made, not at all for the purpose of protecting interests legally cognizable, nor in the performance of a duty which the law encourages, 'the pretense under which it is made, instead of furnishing a defense, will aggravate the case . . . .' *Orrison* v. *Vance,* 262 Md. 285, 294 (1971), quoting from 1 Harper and James, *The Law of Torts,* §5.27, 452 (1956).

The arbitrary transfer of September 26, 1972, without legal justification as matters then stood, did not excuse the plaintiff from exercising discretion in his public life. Nor did

the alleged arbitrary action necessarily render "protectable" subsequent speech or conduct which otherwise would not be so protected.

The substance of plaintiff's remarks on "60 Minutes" had an element of sensationalism. Furthermore, the design and function of the programs in which plaintiff participated tended to spark controversy. Quite obviously, the television and radio audience was in no position to give legitimate assistance. Plaintiff's actions were not reasonably necessary for self-defense. Indeed the media appearances were likely to incite or produce imminent effects deleterious to the educational process, and "instead of furnishing a defense, [aggravated] the case."

It is noteworthy that the fault in plaintiff's public appearances does not lie with the possibility of arousing sympathy to the prejudice of a fair trial, but rather with an indifference to the bounds of propriety which of necessity must govern the behavior of any teacher, regardless of sexual tendencies.

Accordingly, despite the initial transgression of the defendants, the Court can not grant plaintiff the relief for which he prays. Plaintiff's public activities as herein described are not "protectable" and the Court cannot at this time characterize the refusal to reinstate plaintiff or renew his contract as arbitrary or capricious under either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, it is this 31st day of May, 1973, by the United States District Court for the District of Maryland,

ORDERED that the injunctiye relief requested by the plaintiff be and the same is hereby DENIED.

/s/ J. H. Young
United States District Judge